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MICHAEL RODAK, JR., CLERK

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1976

—○—  
No. 76-931  
—○—

ROBERT STOPS AND NORMA STOPS,  
*Petitioners,*

vs.

LITTLE HORN STATE BANK,  
*Respondent.*

—○—  
[REDACTED] BRIEF  
AMICUS CURIAE  
—○—

The State of Montana, by and through its Attorney General, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in opposition to the petition for writ of certiorari filed herein by Robert Stops and Norma Stops.

In support of this motion your *amicus* states that the questions of law as set forth in the accompanying brief have not been adequately presented by the briefs heretofore filed in this matter and that disposition of this matter without consideration of those questions may severely limit the enforceability of the valid judgments of the courts of the State of Montana.

DATED: March, 1977.

Respectfully submitted,  
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*Petitioners,*  
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**LITTLE HORN STATE BANK,**  
*Respondent.*

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**BRIEF AMICUS CURIAE OF THE STATE OF  
MONTANA IN OPPOSITION TO THE  
PETITION FOR WRIT OF CERTIORARI**

---

**ARGUMENT**

**The Decision Below**

The decision by the court below, *Little Horn State Bank v. Stops*, 555 P. 2d 211 (Mont. 1976) evidences the difficulty which has been encountered by the Montana Court in the application of the jurisdictional tests announced by this Court. The Montana Court determined that the often-quoted test of *Williams v. Lee*, 358 U. S. 217, 200 (1959):

Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of the reservation Indians to make their own laws and be ruled by them.

was "apparently overruled" by *Kennerly v. District Court*, 400 U. S. 423 (1971). The court concluded, however, that *McClanahan v. Arizona Tax Commission*, 411 U. S. 164 (1973) and *Fisher v. District Court*, 424 U. S. 382 (1976) had revived the *Williams* test, and that it was thus "appropriate to review this appeal" (555 P. 2d at 213).

The court applied the *Williams* infringement test and concluded that the state action, the writ of execution on the off-reservation state court judgment, did not interfere with the tribe's right to make its own rules and be governed by them (555 P. 2d at 213). The court emphasized that the state district court's subject matter jurisdiction or personal jurisdiction had not been attacked (555 P. 2d at 212), and that the issue was the "enforcement of a valid judgment, *not the proper court to initiate the litigation.*" (Emphasis added, 555 P. 2d at 213.)

#### **The *Williams* Decision and Subsequent Decisions by This Court**

In *Williams v. Lee*, 358 U. S. 217 (1959), a non-Indian merchant operating on the Navajo Reservation sued an Indian in Arizona state court to collect a debt incurred on the reservation. This Court rejected the state court's jurisdiction to entertain the action and laid down the test which has been subsequently applied:

Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

The Court found as a fact that allowing the state court to exercise jurisdiction over this debt action would undermine the tribal courts and infringe upon the right of the Indians to govern themselves (358 U. S. at 222-23). While the Court was most concerned with the infringement question it did note a "general statute" in which Congress had provided a means for states to "assume jurisdiction over reservation Indians" (Public Law 280, 67 Stat. 588). Arizona, the Court noted, had not acted thereunder to accept the jurisdiction granted (358 U. S. at 222-23).

Since *Williams*, state courts have often seized upon the infringement test quoted above, and have determined questions of state jurisdiction involving Indians primarily upon that basis. *See, e. g., Natewa v. Natewa*, 499 P. 2d 691 (N. Mex. 1972). Whatever confusion existed was a result of *Williams*' failure to fully explain what the Court considered to be a "governing Act of Congress," the application which would preclude invocation of the infringement test.

This situation was apparently laid to rest in *Kennerly v. District Court*, 400 U. S. 423 (1971), which, like *Williams*, involved a debt action in Montana State court by a non-Indian against an Indian defendant on a debt incurred within the reservation. In order to meet the *Williams* infringement test, the state relied upon a tribal council resolution attempting to give the state courts concurrent jurisdiction with the tribal courts over civil actions arising on the reservation (400 U. S. at 425). This Court found, however, that the *Williams* test was inapplicable since, by its terms, there was a governing act of Congress which precluded its application (400 U. S. at 427). This governing act of Congress was Public Law 280, *supra*.

Public Law 280 was enacted in 1953 to directly confer criminal jurisdiction over offenses committed by or against Indians in certain areas of Indian country in specified states. 18 U. S. C. § 1162. It likewise directly conferred upon certain specified states "jurisdiction over civil causes of action between Indians or to which Indians are parties." 28 U. S. C. § 1360. Neither of these direct grants of jurisdiction was applicable to the State of Montana. Sections 6 and 7 of the Act, however, provided (67 Stat. 590):

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

These two sections allowed the "optional states" not directly granted jurisdiction to assume civil and criminal jurisdiction in accordance with the preceding sections of the Act by amending their constitutions and statutes to remove impediments to jurisdiction where necessary, or

by affirmative legislative action. Thus, the states were unilaterally allowed to extend civil and criminal jurisdiction over causes of action or offenses involving Indians arising or committed in Indian country.

Public Law 280 was amended by Title IV of the Civil Rights Act of 1968 (P. L. 90-284, 82 Stat. 79; 25 U. S. C. § 1321-1326). The amendments repealed Section 7 of the Act, but not any jurisdiction acquired thereunder prior to that time (25 U. S. C. § 1323). As to civil jurisdiction, the amendments allow states, with consent of the affected tribe evidenced by majority vote of the adult members voting at a special election, to assume jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country" within the state (25 U. S. C. § 1322). These amendments were enacted in response to tribal criticism over the unilateral nature of the prior law. *See*, 1968 U. S. Code Cong. and Admin. News 1837, 1865-66.

These enactments, the *Kennerly* Court held, were "governing Acts of Congress" under *Williams* (hereafter, both the original Act, and the 1968 amendments will be referred to as Public Law 280). The dispute in *Kennerly* thus resolved itself to a determination of whether Montana had acted under either Public Law 280 to assume jurisdiction over the debt action in question. The Court strictly construed the statutory procedures and found no jurisdiction (400 U. S. at 425, 429).

While the court below in the instant case construed *Kennerly* as overruling the *Williams* infringement test (555 P. 2d at 213), that was clearly not done. Rather, the *Kennerly* Court applied the *Williams* test but simply con-

strued Public Law 280 as a governing Act of Congress. The "infringement" portion of the test was not ignored or overruled, it was simply inapplicable because of the triggering effect of the Congressional enactments (400 U. S. at 426-27).

Further refinements to *Williams* and *Kennerly* were forthcoming in *McClanahan v. Arizona Tax Commission*, 411 U. S. 164 (1973) wherein this Court struck down Arizona's application of its income tax as applied to an Indian whose income was earned solely from reservation sources. The Court held that the *Williams* non-infringement test applies "principally" to situations involving non-Indians, and, in those situations in which the tribe and the state could fairly claim an interest, allows the State to protect its interests to the point of affecting tribal self-government (411 U. S. at 179). In cases involving Indians, however, such as *Williams*, *Kennerly* and *McClanahan*, the governing acts of Congress "may not be ignored simply because tribal self-government has not been infringed." (411 U. S. at 180). Thus, far from being a revival of *Williams* as found by the court below in the instant case (555 P. 2d at 213), the *Williams* test, while it was never dead, clearly now applies to situations involving non-Indians.

These clear lines were somewhat blurred last year by *Fisher v. District Court*, 424 U. S. 382 (1976) which involved the issue of whether the Montana courts had jurisdiction over an adoption in which all parties were reservation Indians. While the *Fisher* opinion correctly states that the *Williams* infringement test applies to litigation between Indians and non-Indians it held that an all-Indian

proceeding must at least meet that standard. The Court then went on to analyze the case in terms of infringement, and devoted only one sentence to a statement that the state had not acted under Public Law 280 to acquire the applicable jurisdiction.

Thus while *Fisher* did point out the limitations on the *Williams* infringement test, and did note that Public Law 280 had not been complied with, the opinion *in toto* is so close to *Williams* that it is no wonder that state courts eager to protect their jurisdiction have seized upon it to find an expansion of *Williams*. See 555 P. 2d at 213. This *amicus* does not construe *Fisher* as being intended as a retreat from *Kennerly* and *McClanahan*, and this Court is urged to clarify this point.

#### **Public Law 280 Does Not Apply to the Instant Case**

It is the central argument of this *amicus* that Public Law 280 does not apply to the issue raised by the petitioner herein. Rather, since Public Law 280 is inapplicable, the *Williams* infringement test must be used to determine whether execution of the judgment on the reservation was proper. A focus upon the statutes was recently confirmed by *McClanahan v. Arizona Tax Commission*, *supra*, wherein this Court noted that the trend in resolving jurisdictional disputes has been away from the idea of inherent Indian sovereignty as a bar to state action, and toward a reliance on federal preemption (411 U. S. at 172). This approach avoids "platonic notions of Indian sovereignty" and relies instead upon applicable treaties and statutes to define the limits of state power (*Id.*).

A focus upon Public Law 280 (25 U. S. C. §§ 1321-1326) supports the argument that there is nothing therein to preclude the execution of judgment attempted in the instant case. As it applies to civil jurisdiction, Congress has provided (25 U. S. C. § 1322(a)):

(a) The consent of the United States is hereby given to any State not having jurisdiction over *civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country* situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State. (Emphasis added.)

The plain language of this provision indicates that it is designed to provide a means for states to *acquire* jurisdiction over civil causes of action to which Indians are parties and which *arise* in Indian country (See 18 U. S. C. § 1151). Thus, § 1322 (a) applies to the *initial* acquisition of state jurisdiction, and does not govern situations such as the present one in which state jurisdiction has validly attached based upon a transaction which *did not arise* on the reservation. Therefore, under *Williams*, the infringement test would be used, as was done by the court below, to determine the validity of the execution of judgment in the instant case.

This construction of § 1322 (a) finds support in this Court's recent decision in *Bryan v. Itasca County*, 96 S. Ct. 2102; 44 U. S. L. W. 4832 (1976). The *Bryan* opinion was concerned with Minnesota's imposition of personal property tax on a mobile home owned by a reservation Indian, and the majority of the opinion was devoted to an analysis of Public Law 280 jurisdiction. The Court found that the legislative history of Public Law 280 civil jurisdiction provisions was sparse, but concluded:

Piecing together as best we can the sparse legislative history of § 4, subsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State "jurisdiction over civil cause of action between Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State . . . has jurisdiction over other causes of action." With this as the primary focus of § 4 (a), the wording that follows in § 4 (a)—"and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within Indian country as they have elsewhere within the State"—authorizes application by the state courts of their rules of decision to decide such disputes. Cf. 28 U. S. C. § 1652. This construction finds support in the consistent and uncontradicted references in the legislative history to "permitting" "State courts to adjudicate civil controversies" arising on Indian reservations, H. R. Rep. No. 848, at 5, 6 (emphasis added), and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations. *In short, the consistent and exclusive use of the terms*

"civil causes of action," aris[ing] in, "civil laws of general application to private persons and private property," and "adjudicat[ion]," in both the Act and its legislative history virtually compels our conclusion that the primary intent of § 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court. [Footnotes omitted, emphasis added].

While the Court used this language to support its argument that Public Law 280 conferred jurisdiction over civil causes of action but did not confer taxing authority, it clearly also supports the argument made above. That is, the statute is directed toward the acquisition of state civil jurisdiction and has no application to a situation in which jurisdiction has already validly attached independently of Public Law 280.

In the instant case the state court had valid jurisdiction over the cause of action which arose from an off-reservation transaction. This jurisdiction was not attacked below (555 P. 2d at 212), and is not raised as an issue before this Court (Petitioner's Brief, p. 2). The validity of this jurisdiction follows the general rule that:

an Indian who is "off the reservation" is subject to the laws of the State or Territory in which he finds himself, to the same extent that a non-Indian citizen or alien would be subject to those laws.

Cohen, U. S. D. I. Federal Indian Law, 510-11 (1958). The jurisdiction of states over off-reservation activities was bolstered by this Court's opinion in *Mescalero Apache Tribe v. Jones*, 411 U. S. 145 (1973). Although *Mescalero* dealt with the "special area of state taxation" in which state jurisdiction is very circumscribed (*Bryan v. Itasca County*,

*supra*), the Court noted that broad assertions of exclusive federal jurisdiction have become "particularly treacherous." (411 U. S. at 148). At 411 U. S. 148-49, this Court held:

Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

The conclusion of *Mescalero* was that the state possessed jurisdiction to tax the receipts of a ski resort that the tribe had chosen to operate off the reservation. The petitioners in the instant case would have this Court hold that individual Indians who likewise choose to conduct their business off the reservation can escape the resulting obligations by retreating to the reservation. This argument is unwarranted in light of *Mescalero* since the entity being taxed there on its off-reservation activities—the tribe itself—was certainly located within the reservation. If the state in *Mescalero* could not collect the tax because the tribe resided within the reservation, or if the instant judgment could not be executed within the reservation, then both the power to tax and the jurisdiction to enter judgment would be nullified.

The implication of *Mescalero*, and the argument urged upon this Court by your amicus, is that an Indian choosing to transact business off the reservation thereby submits himself to the state law and resulting remedies that arise from and apply to that transaction.

It has been a long standing doctrine that any court having jurisdiction to render a judgment also has the power to enforce that judgment into effect. *U. S. ex rel. Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768 (1868);

*Pam-to-Pee v. United States*, 187 U. S. 371, 23 S. Ct. 142, 47 L. Ed. 221 (1902); *Hamilton v. Nakai*, 453 F. 2d 152, cert. den. 406 U. S. 945, 92 S. Ct. 2044, 32 L. Ed. 2d 332.

This Court defined "jurisdiction" 6 Wall. 166, 18 L. Ed. at p. 773 in *Riggs*:

Jurisdiction is defined to be the power to hear and determine the subject matter in controversy in the suit before the court, and *the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree.*

Express determination of this court is that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. [Emphasis added.]

The Montana legislature enacted section 93-1106, R. C. M. 1947, which contains language analogous to this principle. That section has been interpreted to confer upon a court having proper jurisdiction, all the means necessary to carry the same into effect, and if the court has the power to make an order, it has jurisdiction to enforce that order. *State ex rel. Eisenhower v. District Court*, 54 Mont. 172, 168 P. 522.

The district court below initially sought to enforce its judgment by a writ of execution pursuant to section 93-5801 et seq., R. C. M. 1947. A writ of execution against property of a judgment debtor may be issued by the district court to the sheriff of any county in the state. Section 93-5809, R. C. M. 1947. Thus, a district court has statewide enforcement power under that section. However, the writ must issue to the proper sheriff, since a sheriff has no authority to serve the writ outside of his

county. *Merchants Credit Service v. Chouteau Co. Bank*, 112 Mont. 229, 114 P. 2d 1074.

Absent the existence of the Crow Indian Reservation, there is no question that this writ of execution would be a valid means of enforcing the judgment of the district court. The property subject to the writ was located within Big Horn County, the writ was directed to the sheriff of Big Horn County, and all other essential elements of a valid writ of execution existed. This was in all respects, therefore, a "non-discriminatory state law otherwise applicable to all citizens of the State." (*Mescalero*, 411 U. S. at 148-49).

#### **Allowing Enforcement of the Instant Judgment on the Reservation Would Not Violate the Williams Infringement Test.**

The court below found (555 P. 2d at 213) that the respondent Bank's execution of judgment by attaching petitioner's wages earned on the reservation would not infringe upon the right of the Crow Indians to make their own laws and be ruled by them. (*Williams*, *supra*, 358 U. S. at 220). This conclusion is patently correct and the action below, brought by a non-Indian to collect an off-reservation debt, is a classic situation calling for the application of *Williams*. In fact, a significant and adverse infringement on the lives of individual Indian citizens will result from adoption of petitioner's arguments since off-reservation credit sources will likely dry up as a result of the inability to enforce the commercial obligations on the reservation.

The cases finding interference under *Williams* have involved on-reservation transactions and tribal courts

providing jurisdiction over the disputes involved. *See, e. g., Williams and Fisher, supra.* In this case, however, it must be reiterated that the issue is *not* the proper court to initiate the litigation, but the enforcement of a valid judgment.

The petitioner's brief herein does not make any real showing that enforcement of the instant judgment would infringe upon Indian self-government in any way. The only arguments made consist of recitations concerning the general nature of courts of Indian offenses (citing 25 C. F. R. Pt. 11), and implications that the Crow Tribe maintains a judicial system capable of enforcing the judgment herein (Pet. Br. pp. 9-13). However, neither the federal regulations cited above nor the Crow Law and Order Code provide any means for on-reservation enforcement of a state court judgment, and no method of attaching property of a state judgment debtor. The most that the regulations provide is for enforcement of *tribal court* judgments against an Indian defendant from funds held "to his credit at the agency office" (25 C. F. R. § 11.26(c)). Moreover, the civil jurisdiction of the Tribal Court attaches only upon stipulation of both parties (25 C. F. R. § 11.22). It would indeed be an idle act to require the respondent Bank to attempt to invoke Tribal Court jurisdiction over the petitioners and await their decision as to whether they consented to be sued. The petitioners here must be required to show a real remedy and some real interference with tribal self-government. *Utah & Northern R. v. Fisher*, 116 U. S. 28 (1885).

The only contacts with the Tribal Government in the instant transaction are remote at best. The attachment

sought by respondent Bank was against petitioner's wages, which were not paid by or derived from the Tribe. This is not a situation in which execution has been attempted against restricted trust property (*See Jordan v. O'Brien*, 18 N. W. 2d 30 (S. D. 1945)), and no power to do so is argued here.

### Conflicts Among the Courts Below

The various lower courts, state and federal, which have considered issues similar to the present one have reached differing conclusions. The only case directly on point cited in petitioners' brief (Pet. Br. p. 14) is *Annis v. Dewey County Bank*, 335 F. Supp. 133 (D. S. D. 1971). In *Annis* the non-Indian creditor obtained a state court judgment against the Indian debtor on promissory notes secured by collateral located on the reservation. The court concluded that the county sheriff could not attach the Indian debtor's property located on the reservation in order to satisfy the judgment (335 F. Supp. at 135-36), since state officials have no jurisdiction to enforce a state judgment on a reservation. Two cases were cited in support of this conclusion. In *Commissioner v. Brun*, 174 N. W. 2d 120 (Minn. 1970), the issue was whether the state could collect an income tax from reservation Indians. While this ultimate holding was correct in light of *McClanahan, supra*, the court also stated, that the state lacked jurisdiction to enforce a judgment against a reservation Indian. This bare statement offers little support for that conclusion. Further, the action involved the Red Lake Reservation in Minnesota which was the only reservation in that state expressly excepted from the direct grant of civil jurisdiction in 28 U. S. C. § 1360. This res-

ervation, the Minnesota court has acknowledged, "enjoys a peculiar status among Indian reservations in this and other states." *County of Beltrami v. County of Hennepin*, 119 N. W. 2d 25, 30 (Minn. 1963). Thus holdings involving the Red Lake Reservation should be accorded little weight as applied to other factual settings.

The other case relied upon by *Annis* was *Jordan v. O'Brien*, 18 N. W. 2d 30 (S.D. 1945), which involved the validity of attachment of reservation real property still under federal trusteeship. It is undisputed that trust property is not subject to state execution, and no such question is presented in the instant case.

The other cases cited at pp. 14-15 of petitioners' brief are not apposite to the present issue. *Arizona ex rel. Merrill v. Turtle*, 413 F. 2d 683 (9 Cir. 1969) involved the state's power of extradition, and not enforcement of a civil judgment. It is interesting that petitioners have relied upon *Turtle*, however, since the court's conclusion that the state lacked extradition jurisdiction within the Navajo Reservation was based wholly upon an analysis under the *Williams* infringement test and not upon whether the state had acted to assume any jurisdiction under Public Law 280. Applying the infringement test, the court found that the relevant treaty had given the Navajo Tribe apparently exclusive jurisdiction over inter-sovereign rendition (413 F. 2d at 686). *Francisco v. State*, 556 P. 2d 1 (Ariz. 1976) involved the service of process necessary to acquire jurisdiction initially, and did not deal with on-reservation enforcement of a valid state court judgment.

In support of the respondent's position herein is *Natewa v. Natewa*, 499 P. 2d 691 (N. M. 1972). In *Natewa*

the non-Indian mother sued in Wisconsin and obtained an order for child support against her Indian husband who was a resident upon the Zuni Reservation in New Mexico. The New Mexico prosecutor, pursuant to the Wisconsin judgment, obtained from the local court an order requiring the support payments. The New Mexico Supreme Court rejected the husband's challenge to jurisdiction, holding (499 P. 2d at 693):

The totality of the marriage relationship shows significant contacts with jurisdictions other than the Zuni Reservation. Appellant cannot interpose his special status as an Indian as a shield to protect him from obligations that result from his marriage to appellee which had been entered into off the reservation.

Since the Wisconsin court obtained proper subject matter jurisdiction over the action, which arose from the marital and not any tribal relationship, the judgment was upheld (*Id.*). Thus, the court was persuaded by the same factors that are present in the instant case: proper subject matter jurisdiction by the state court arising from an off-reservation transaction, and an obligation which arose from personal transactions rather than any status as an Indian. *Cf. State Securities, Inc. v. Anderson*, 506 P. 2d 786 (N. M. 1973). We urge this Court to adopt this reasoning.

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## CONCLUSION

Your *amicus* respectfully urges that this Court deny the petition for writ of certiorari. The present case confronts the Court with a legitimate and vital state interest

in the enforcement of the valid judgments of its courts. The situation *in toto* is one occurring off the reservation and no real questions of intrusion of state civil jurisdiction into the reservation and tribal affairs is presented. State jurisdiction has been recognized in similar situations, and it must also be recognized here. If Montana's Indian citizens are to be guaranteed the continuation of off-reservation sources of credit, state courts must be able to enforce judgments resulting from off-reservation transactions.

Respectfully submitted,

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